IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

APPEAL FROM ORDER NO. 929 OF 2007

IN

EXHIBIT "5"

IN

CIVIL SUIT NO. 3 OF 2007

Shri Dilip Kanani
Sole Proprietor of
vimal Sales &Services ... Applicant
(Org.Deft. No.1)

Vs.

Pitambari Proucts Pvt.Ltd. ... Respondent
(Orig. Plaintiff)

And

Gold Square International & Ors. Resopndents
(Org.Deft. No.2 to 4)

Mr. Mahesh Mahadgut, Advocate, i/b. Sanjeev S. Hariakar, Advocate for the applicant.

Mr. H.W.Kane,Advocate a/w Rahul M.kadam a/w Madhav

Jamdar for respondent No.1.

CORAM: J.H.BHATIA,J.

DATE: 12th December,2007.

P.C.

1. This Appeal is preferred by original defendant No.1 against the order of temporary injunction passed against him and defendants Nos. 2 to 4 on the application filed by the original plaintiff-respondent No.1. For the sake of convenience, the parties may be referred as per the original record.

2. It is the case of the plaintiff that since 1983, the plaintiff has been producing and marketing several products under the brand name "Pitambari". One of the products is a powder used for the purpose of cleaning and shining utensils and articles of copper, brass, etc. The product is marketed and sold in the pouches specifically designed for that purpose. The plaintiff has, in course of time, spent huge amount on advertising this brand name and sale of the products. Sale of the products of the plaintiff under the trade name "Pitambari" has increased year after year because of the

hard work of the team of the plaintiff. This product has become very popular amongst women of the poor and middle class families as well as maid servants of the rich families who purchase such powder for carrying out their duties in such households. Sometime in October 2006, defendants Nos. 1 to 4 misused the popularity and goodwill of "Pitambari" trade name of the plaintiff by bringing out a similar product in similarly packed pouch with trade name "Kamberi". The price of both the products is also same i.e. Rs.10/-. According to the plaintiff, defendant no.1 was previously working with the plaintiff as C&F Agent and shortly before he started marketing the product by the trade name "Kamberi", he had left the work of the plaintiff as C&F Agent. Having taken "Situational benefit" of his proximity with the plaintiff and the knowledge of its product, he came out with the similar product with similar or deceptively similar packing with almost similar name also. It is contended that defendant No.2 carries on business of manufacturing cleaning, polishing, scouring and abrasing preparations which are being marketed by defendant No.1. Defendant No.3 is the agent of defendant Nos. 1 and 2 and defendnt No.4 is a retailer selling the products of defendant No.1. They have committed acts of infringement of copyright and trade mark of the plaintiff as well as they have committed acts of passing

off by using the trade mark which is deceptively similar to the trade mark and packing of the plaintiff's products. Therefore, the plaintiff sought temporary injunction restraining the defendants from infringing the plaintiff's copyright in its artistic label, Exhibits "A" & "A-1" by reproducing the same in material form or by printing, publishing or using the impugned trade mark label being Exhibits "B" and "B-1" or from carrying out any other work which is an imitation of the plaintiff's artistic label. He has sought temporary injunction restraiing the defendants from infringing the plaintiff's trade mark No. 547536 and 767725 by using the trade mark label with the word "KAMBERI" or any other trade mark. He also sought temporary injunction restraining the defendants from marketing, manufacturing, selling, offering for sale, advertising or otherwise dealing in scouring powder bearing the trade mark labels at Exhibits "B" and "B-1" or any other trade mark label deceptively similar to the plaintiff's trade mark label at Exhibits "A" and "A-1".

3. Defendant No.1 contested the application, Exhibit 5, by filing the reply Exhibit 17. Thereby he also sought orders to vacate the ad-interim injunction which was already granted. He denied that plaintiff is a registered proprietor of the trade mark "PITAMBARI"

and he contends that in view of this the plaintiff cannot initiate any action for infringement of his trade mark. According to him, the figures of utensils, traditional lamp, etc. are the common household articles in the Indian families and the products used for the purpose of scouring, cleaning, polishing and shining the copper or brass articles are also common in the market. The plaintiff cannot claim exclusive right or monopoly of marketing of such products. The labels are prepared in golden colour background. It is contended that the plaintiff cannot claim any monopoly over the golden colour background or any other colour combination used for the labels of the plaintiff's product "PITAMBARI". It is contended that "Tamberi" is a Marathi word in a generic sense that it pertains to articles made of "Tamba" i.e. copper and defendant No.1 has used the word "KAMBERI"by substituting alphabet "T" by alphabet "K". Besides this, along with the trade mark "Kamberi" he has also put his own surname "Kanani" which clearly distinguishes this from the product of the plaintiff. According to him, the defendants have acquired their own goodwill in the market and had made sales worth lakhs of rupees with the trade name "Kanani KAMBERI" and they intend to have healthy competition with the plaintiff.

4. After perusal of the record and hearing the parties, the learned trial Court granted the temporary injunction as sought by the plaintiff.

5. Heard the learned Counsel for the parties. Perused the record as well as the labels and pouches used by both the parties. The pouches with labels of Pitambari" trade mark of the plaintiff are at Exhibits "A" and "A-1" while the pouches with label "Kanani KAMBERI" of the defendants are at Exhibits "B" and "B-1" They do not dispute that the product of both the parties is similar and it is used for the purpsoe of cleaning, polishing, scouring, and shining of the brass and copper utensils and articles. The plaintiff has given a chart in the plaint showing similarity between the two products. :-

Sr. No.	SIMILARITIES BETWEEN	
	Plaintiff's label	Defendants' label
1.	It is a vertical rectangular label	It is a vertical rectangular label
2.	It has golden coloured background.	It has golden coloured background.
3.	It has a dark coloured	It has dark coloured

	band at the top	band at the top.
4.	It has a device of a traditional brass lamp and a brass vessel and a coconut on it with a Swastik sign.	It has a device of a traditinal brass lamp and a coconut on a brass vessel with a Swastik sign
5.	The word "PITAMBARI" in Devanagari script appears at the top of the label in red colour with a white border.	The word "KAMBERI" in Devnagari script appears at the top of the label in red colour with a white border.
6.	The word "PITAMBARI" in English appears at the centre on right hand of the label within a dark band, in red colour with a white border.	The word "KAMBERI" in English appears at the centre on right hand of the label within a dark band, in red colour with a white border.
7.	The words "Shines Copper & Brass" is written below the word "PITAMBARI" in English.	The words "Shining Copper Brass" appears below the word "KAMBERI" in English.
8.	The placement of trademark PITAMBARI and devices, are inside a thin, dark coloured rectangular border.	The placement of trademark KAMBERI and devices, are inside a thin, dark coloured rectangular border.

After careful perusal of both the labels, I find substance in the contention of the plaintiff. Both these pouches are almost similar. Both packets and labels are vertical rectangular. Both have golden coloured background with dark colour band. There are photographs of a traditional brass lamp and pot with a coconut on it with the mark of swastik. On the label of

the defendants. Also there are photographs of traditional brass lamp and pot with coconut and other brass utensils. The trade mark of "Pitambari" and "Kamberi" are printed in red with white border on the dark on the top of the label. The name "Pitambari" and "Kamberi" both appear in English in right side middle portion of the label. There is also a dark band on which there is a white borderline and the words "Pitambari" and Kanmberi" are printed in red. The price of both products is Rs.10/-. Both labels make it clear that product is used for shining the copper, brass etc. For an illiterate or semiliterate person or even a literate person, unless he reads the name, it is difficult to make any difference between the two labels. If one does not read name of the product, one may accept one for the another product.

6. Learned Counsel for the plaintiff relied upon several authorities in support of the claim of the plaintiff. In **Amritdhara Pharmacy vs. Satya Deo Gupta, AIR 1963 SC 449,** Their Lordships cosidered the principles which need to be borne in mind and what needs to be considered to decide whether one product has deceptively resemblance with another. Their Lordships observed as follows :-

"(7) It will be noticed that the words used in the section and relevant for our purpose are "likely to deceive or cause confusion". The Act does not lay down any criteria for determining what is likely to deceive or cause confusion. Therefore, every case must depend on its own particular facts, and the value of authorities lies not so much in the actual decision as in the tests applied for determining what is likely to deceive or cause confusion. On an application to register, the Registrar or an opponent may object that the trade mark is not registrable by reason of cl. (a) of S. 8, or sub-sec. (1) of S. 10, as in this case. In such a case the onus is on the applicant to satisfy the Registrar that the trade mark applied for is not likely to deceive or cause confusion In cases in which the tribunal considers that there is doubt as to whether deception is likely, the application should be refused. A trade mark is likely to deceive or cause confusion by its resemblance to another already on the Register if it is likely to do so in the course of its legitimate use in a market where the two marks are assumed to be in use by traders in that market. In considering the

matter, all the circumstances of the case must be considered. As observed by Parker, J., in Re Pianotist Co’s Application , (1906) 23 RPC 774,which was also a case of the comparison of two words -

"You must take the two words. You must judge them, both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact you must consider all the surounding circumstances; and you must further consider what is likely to happen if each of those trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks." (p.777)

For deceptive resemblance two important questions are: (1) who are the persons whom the resemblance must be likely to deceive or confuse, and (2) what rules of comparison are to be adopted in judging whether such resemblance exists. As to confusion, it is perhaps an appropriate description of the state of mind of a customer who, on seeing a mark thinks that it

> difers from the mark on goods which he has previously bought, but is doubtful whether that impression is not due to imperfect recollection. (See Kerly on Trade Marks, 8th edition, p.400)."

From this authority, it is clear that what is required to be seen is whether the trade mark or any part of the trade mark is likely to deceive or cause confusion and for deceptive resemblance, it is to be seen as to who are the persons whom the resemblance is likely to deceive or confuse. If a customer has previously purchased certain product with a particular trade mark and intends to purchase same but is offered a similar product later with a different but resembling trade mark and if he has doubt as to whether it is same product or a different product, it is likely to create confusion in his mind.

7. In **M/s. Hiralal Parbhudas vs. M/s. Ganesh Trading Co. and Ors. AIR 1984 Bom.218,** the Division Bench of this court observed as follows :-

> *"4. The main bone of contention between the parties before us is whether the respondents' label is deceptively similar to the appellants' labels. To that end, ti would be appropriate to*

recapitulate some well-established principles. In Kerly's 'Law of Trade Marks and Trade Names' (10th Edition, pages 456-457) appears the following passage :-

"Two marks, when placed side by side, may exhibit many and various diferences, yet the main idea left on the mind by both may be the same. A person acquainted with one mark, and not having the two side by side for comparison, might well be deceived, if the goods were allowed to be impressed with the second mark, into a belief that he was dealing with goods which bore the same marks as that with which he was acquainted. Thus, for example, a mark may represent a game of football; another mark may show players in a different dress, and in very different positions and yet the idea conveyed by each might be simply a game of football. It would be too much to expect that persons dealing with trade-marked goods and relying, as they frequently do, upon marks, should be able to remember the exact details of the marks upon the goods with which they are in the habit of dealing. Marks are remembered rather by general impressions or by some significant detail than

by any photographic recollection of the whole. Moreover, variations in details might well be supposed by customers to have been made by the owners of the trade mark they are already acquainted with for reasons of their own."

In Re: Sandow Ltd. (1914) 31 RPC 196, it was held that identity of the figure in the centre is immaterial, the overall similarity between the two marks being the touchstone. In James C. & Bros. v. N.S.T.Co., AIR 1951 Bom. 147, it was held bythe Divison Bench that it is important to find out what is the distinguishing or essential feature of the trade mark already registered and what is the main feature or the main idea underlying that trade mark and ascertain if the trade mark whose registration is sought contains the same distinguishing or essential features or conveys the same idea. The question to be asked is what would be the salient feature of the mark which in future would lead the purchaser to associate the particular goods with that trade mark. In Corn Products v. Shangrila Food Products, AIR 1960 SC 142, holding that "Glucovita" and "Gluvita" were deceptively similar, it was observed that in deciding the question of similarity between

the two marks the approach must be from the point of view of a man of average intelligence and of imperfect recollection and to such a person the overal structural and phonetic similarity and the similarity of the idea in the two marks is reasonably likely to cause confuson betwen them. In Amritdhara Pharmacy v. Satya Deo, AIR 1963 sC 449, coming to the conclusion that to an unwary purchaser of average intelligence and imperfect recollectioon, the overall structure and phonetic similarity between the two names "Amritdhara" and "Lakshmandhara" was likely to deceive or cause confuson, it as held that if a person is put in a state of wonderment it is sufficient to hold that the mark is likely to deceive or cause confusion. In F.Hoffimann-La Roche & Co. Ltd. v. Geoffrey Manners & Co. Pvt.Ltd., AIR 1970 SC 2062, it was held that marks must be compared as a whole, the true test being whether the totality of the proposed trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons accustomed to the existing trade mark. Microscopic examination not called for. Both visual and phonetic tests must be applied. In Parle

products vs. J.P. & Co., AIR 1972 SC 1359, it was held that what must be considered are the broad and essential features of the two marks which should not be placed side by side in order to find out the differences in design. It is enough if the impugned mark bears an overall similarity in the registered mark as would be likely to mislead a person usually dealing with one to accept the other if offered to him. Each case must be judged on its own features and it would be of no use to note on how many points there was similarity and in how many others there was absence of it."

"5. What emerges from these authorities is (a) what is the main idea or salient features, (b) marks are remembered by general impressiions or by some signficant detail rather than by a photographic recollection of the whole, (c) overall similarity is the touchstone, (d) marks must be looked at from the view and first impressiion of a person of average intelligence and imperfect recollection, (e) overall structure, phonetic similarity and similarity of idea are important and both visual and phonetic tests must be applied, (f) the purchaser must

not be put in a state of wonderment, (g) marks must be compared as a whole, microscopic examinatino being impermisible, (h) the broad and salient features must be considered for which the marks must not be placed side by side to find out differences in design and (i) overall similarity is sufficient. In additon, indisputably must also be taken into consideration the nature of the commodity, the class of purchasers, the mode of purchase and other surrounding circumstances."

Several other authorites have been referred to by both the sides, but the basic principles, as noted above, have been followed in all these authorities and, therefore, I do not find it necessary to refer to more authorities. Taking into consideration these principles, the question is who are the possible custoomers for these products? What may be their intellectual level and whether they are in a position to make distinction between the two products in view of the similar labels and texts.

8. It is true that the names "PITAMBARI" and "Kanani KAMBERI" cannot be said to be similar. If a person reads the name, it will not be difficult to find

that these are two different products of different companies. The record reveals that the similar products are marketed by several companies. Some labels have been produced on record. Besides "Pitambari" and "Kanani Kamberi", these products are also marketed with trade mark "Suvarnaa", "Mawani Shining Powder" "Peetamba Gold", "Panchadhatu", "Astha", "KASAUTI", "TambaShri", "Ratnamani", "Soneri", "Shwetambari", "Laxmi", "Tamberi Piteri" and "Panchratna". It appears that these products are marketed in the similar rectangular pouches most of them used gold or yellow colours and names of most of them are printed in red with background etc. It is material to note that in most of these products, there are photographs of traditional brass lamp, copper pot with coconut and otherr utensils of brass and copper. However, it may be noted that the similarities which are seen in "PITAMBARI" of the plaintif and "Kanani KAMBERI" of the defendants are deceptively similar. So much similaity cannot be found in respect of labels of other products though similar product is being marketed in different names. In view of this, I find that there is a possibility of customer being confused due to resemblance in and deceptively similar labels of "PITAMBARI" and "Kanani KAMBERI" and if the customer does not read the name, the possibility of customer being deceived or confused cannot be ruled out

and thus the product of the defendants may be passed off as the product of the plaintiff and, therefore, it is necessary to pass an order of temporary injunction restraining the defendants from misusing the trade mark and design of the label of the plaintiff.

9. As pointed out above, out of some of the names of similar products, "PEETAMBA", 'SHWETAMBARI", "TAMBERI PITAMBARI" apear to be slightly similar with the names "PITAMBARI" and "KAMBERI".
The name "Kanani KAMBERI" cannot be said to be deceptively similar with that of the plaintiff's product "PITRAMBARI". However, it is not the name but the design, colour, combinations, etc. of the label of the defendant's product deceptively resemble with that of "PITAMBARI" and are likelyto cause confusion in the mind of the likely customers. It is material to note the following observation made by the trial Court in the impugned order:-

> "A notable aspect is that if the defendant nO.1 being unaware of the label pattern of "Pitambari" on Annexures A and A-1 had used similar kind of label being Annexures B and B-1 unknowingly like any other trader there was every reason for defendant no.1 to press his

> plea for being allowed to use his trade name, "Kanani Kamberi", but in the peculiar background of the case defendant No.1 seems to have taken 'situational advantage' of his previous business association with the plaintiff and has practised 'deceit' upon the plaintiff and defendant No.1 eiher directly or through his associates, defendants Nos.2 to 4 cannot be allowed to take advantage of his own wrong..."

From these observations, it is clear that only because defendant No.1 had proximity with the plaintiff and its business and had taken situational advantage, the trial Court felt that he had practised 'deceit'. These observations also indicate that if the defendants would not have such situational advantage and unknowingly like any other trader, he would have used the similar kind of label, he could press his plea for being allowed to use his trade name "Kanani Kamberi". When the product in the particular packing level is marketed, the customer is not expected and likely to know whether the producer of that product had any proximity with the producer of similar product already in the market nor such a customer is likely to know whether the producer of such product had taken situational advantage. In my considered opinion, the proximity of defendant no.1 with

the plaintiff and its business or situational advantage he has alleredly taken are irrelevant for the purpose of deciding if trade name "Kanani Kamberi" may or may not be allowed to be used. As I have pointed out that there are similar products in the market with different names and many of the names are, to some extent, similar, but the customers are not likely to be deceived. The packing and labels of those products are not deceptively similar with that of the plaintiff. Such producers are also marketing their products and nobody can claim monopoly of the business of such powder which is used in almost every household. Therefore, in my considered opinion, the defendants could not be injuncted from using the trade name "Kanani "KAMBERI" which is substantially different from the name "PITAMBARI" but the defendants can be restrained from using the label similar or deceptively similar to that of the plaintiff. The impugned order needs to be suitably modified.

10. In the result, the Appeal is partly allowed. While the injunction order passed by the trial Court is maintained, it is made clear that the defendants are not being restrained from using the mark "KAMBERI" or "Kanani KAMBERI". With this clarification, the Appeal stands disposed of.

11. At this stage, the learned Counsel for the plaintiff-respondent No.1 makes a request to continue the operatioon of the order passed by the trial Court for further 8 weeks. This prayer is objected to by the learned Counsel for appellant-defendant No.1. Taking into consideration the ensuing winter vacation, the temporary injunction, which is in force, shall continue to be in force for a further period of six weeks.

12. Parties to act on copy of this order duly authenticated by the Sheristedar of this Court.

13. As the Appeal itself is disposed of, Civil Application No.1278 of 2007 does not survive and stands disposed of accordingly.

(J.H.BHATIA,J.)